

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF PENNSYLVANIA

ROBIN NIXON,

Plaintiff,

-vs-

NORFOLK SOUTHERN CORPORATION  
and NORFOLK SOUTHERN RAILWAY  
COMPANY, INC.

Defendants.

Civil Action  
No. 05-101 ERIE

DEPOSITION OF: ROBERT E. ROCKEY

DATE: January 9, 2007  
Tuesday, 2:40 p.m.

LOCATION: Segel & Solymosi  
818 State Street  
Erie, PA 16501  
814-454-1500

TAKEN BY: Plaintiff

REPORTED BY: Toni Rennebeck, RPR  
Notary Public  
NMR Reference No. 010907B

ORIGINAL



1 We would load the boats. We were at Ontario  
2 Hydro.

3 Q. So that was the end of your days as a cross  
4 watchman.

5 A. That's correct. I did that for three years and  
6 then retired.

7 Q. In the period of time that you worked in the  
8 towers, did you ever observe any children  
9 playing in the street area of the tracks, in the  
10 West 19th Street portion of the tracks where the  
11 tracks go down the middle of 19th Street?

12 A. From time to time you would see children, but  
13 not -- you know, it wasn't a regular thing.  
14 Most people would not allow their kids to be on  
15 tracks to be honest with you, you know.

16 Q. Well, sure.

17 A. Any responsible parent wouldn't allow their  
18 children to be there.

19 Q. Of course not.

20 A. So usually you did not.

21 Q. Right. But we all know -- we were kids and our  
22 parents didn't always know where you're at;  
23 right?

24 A. Yeah, I guess.

25 Q. So tell me about what you observed with regard

1 to children on the street or track area of West  
2 19th Street.

3 A. Well, West 19th Street wasn't as heavily  
4 populated as the other streets in the area.  
5 There was only housing on one side. You had the  
6 cemetery there and you had industry. When I  
7 first started working there it was all industry.  
8 There was just a few places where there was just  
9 a few houses there. So it really wasn't -- the  
10 kids would -- usually they would be going maybe  
11 across the tracks to go somewhere else, but they  
12 didn't normally play on 19th Street, you know.

13 Q. Did you ever see any kids riding their bikes  
14 along 19th Street?

15 A. I'm sure I did, you know. They probably were  
16 riding along, yeah. Probably, yeah.

17 Q. Did you ever see them riding along while trains  
18 were traversing 19th Street?

19 A. Normally didn't. Normally you didn't, you know.  
20 People, like I say, people generally stay clear  
21 of trains, you know.

22 Q. You say normally though. So were there times  
23 that maybe you saw someone --

24 A. Riding a bike? Sure.

25 Q. -- a child on a bike maybe closer to the train

1 than they should be?

2 A. Oh, there were times when I was in the ground  
3 crossings and stuff and I'd tell them, you know,  
4 this is not --

5 There were signs there, you know.

6 Q. There were?

7 A. Yeah, there were signs there.

8 Q. What did the signs say?

9 A. That it belonged by Norfolk Southern. At the  
10 center, you know, where the track was itself was  
11 belonged by Norfolk Southern, and there were  
12 signs telling people that --

13 Q. Do you know what the sign said?

14 A. I can't remember now it's been so many years.

15 Q. You said that you were aware of what was in the  
16 area. Were you aware that there was a  
17 playground located on the south side of 19th  
18 Street somewhere, a block or two west of Sass?

19 A. Let me think. I remember there was something  
20 there, but there was never anybody there in that  
21 area right there. I think there was at one time  
22 a swing set or something over there.

23 Q. There was a little playground and a basketball  
24 court.

25 A. Okay. Yeah. But I was never in that area right

1 A. Yeah.

2 Q. Jim Baskin?

3 A. Yeah.

4 Q. Mark Allen?

5 A. That's correct.

6 Q. Any others that you can think of?

7 A. Not really. Jim Gruey.

8 Q. Jim Gruey? How do you spell that?

9 A. He's deceased now.

10 Q. Oh, okay.

11 A. That's about all I can remember. Yeah, Jim

12 Gruey. Probably those five. That's probably

13 it.

14 Q. How about other cross watchmen?

15 A. There was a kid behind us by the name of Furman.

16 A guy by the name of Furman from New York.

17 Q. Do you know where he's at now?

18 A. Don Gray and Elmer Rundel are both dead now.

19 They're both deceased. I think pretty much

20 they're all gone now. I think that guy and

21 myself are about the only ones left.

22 Q. Did you ever see any kids actually ride their

23 bikes and ride up alongside the train as it was

24 going down the tracks and grab on and get towed

25 by the train?

1 A. I probably seen everything in the years that  
2 I've been there, and I probably saw that a  
3 couple of times.

4 Q. Yeah?

5 A. Yeah. Maybe once or twice I saw kids doing  
6 that. Yes, I can say that.

7 Q. Were you able to do anything about it?

8 A. I pulled a kid away from it once; I remember  
9 that. I think I yelled at a kid that was doing  
10 it and he got away from it.

11 Q. Did you ever report that to any of your  
12 supervisors or --

13 A. Well, they -- I'm sure that they, you know --  
14 No, I don't think I ever did, to be  
15 honest with you. Supervision was more, you  
16 know, they were -- there wasn't a supervisor in  
17 this area for one thing. It was our job to do  
18 that, you know. You don't have a kid's name or  
19 something else, you know, there's nothing you  
20 can do about it. If someone did do something  
21 and you got his name or something, then you  
22 would report that to a supervisor.

23 Q. I see. Do you know or can you remember whether  
24 or not anyone ever instructed you to watch for  
25 any unsafe activities regarding children along

1 the tracks on 19th Street? Did anybody ever  
2 tell you to watch out for that? Or was it more  
3 related to the school crossing safety?

4 A. Well, I'm sure they did. I'm sure they did. I  
5 don't recall now, but I'm sure that they did at  
6 different points, you know. Supervision would  
7 come around and I'm sure they would -- you know,  
8 they would mention this to us.

9 Q. What would they mention to you?

10 A. Well, they would mention, you know, make sure  
11 that the kids are far enough away from the track  
12 and make sure that everything is -- they would  
13 make sure that we were doing our job is what it  
14 was, you know, and that's what our job consisted  
15 of, so I'm sure that they did. I'll bet every  
16 one of those supervisors did.

17 MR. SOLYMOSI: Okay. I don't think I  
18 have any further questions for you.

19 MR. TAFT: I have nothing for  
20 Mr. Rockey.

21 Mr. Rockey, you have a right, and  
22 it's up to you to decide, to review the  
23 transcript when it's completed to note any  
24 corrections if there are any that need to be  
25 made. You also have a right, if you want, to

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NORFOLK SOUTHERN CORPORATION  
and NORFOLK SOUTHERN RAILWAY  
COMPANY, INC.,

Defendants.

CIVIL ACTION  
NO. 05-101 ERIE

DEPOSITION OF: ROBERT B. GLENN

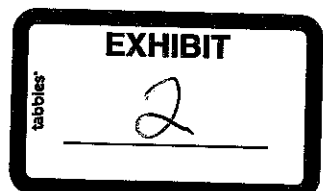
DATE: May 23, 2006  
Tuesday, 11:30 a.m.

LOCATION: Segel & Solymosi  
818 State Street  
Erie, PA 16501  
814-454-1500

TAKEN BY: Plaintiff

REPORTED BY: Toni Rennebeck, RPR  
Notary Public  
NMR Reference No. 052306A

ORIGINAL





1 observed as you were passing through the  
2 intersection?

3 A. That is correct.

4 Q. You had no way of knowing whether or not, in  
5 fact, the crossing lights and bells and the  
6 gates were still operating when you were at  
7 Amthor Steel?

8 A. No, sir; there's no way I could.

9 Q. Do you know what, if any, safety policy Norfolk  
10 Southern had with respect to children being in  
11 an area in a repeated manner?

12 A. None to my knowledge.

13 Q. And it's fair then you were never given any  
14 training in that area?

15 A. No.

16 Q. Are there any other locations where you've  
17 operated a train where the tracks and  
18 residential street were in the same roadway?

19 A. No.

20 Q. Are you familiar with the term attractive  
21 nuisance?

22 A. No, sir.

23 Q. As you traveled along West 19th Street, what was  
24 your procedure for horns or whistles on the  
25 train? Did you blow your horn or whistle or

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NORFOLK SOUTHERN CORPORATION  
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COMPANY, INC.,

Defendants.

CIVIL ACTION  
NO. 05-101 ERIE

DEPOSITION OF: TIMOTHY J. PRICE

DATE: May 23, 2006  
Tuesday, 12:45 p.m.

LOCATION: Segel & Solymosi  
818 State Street  
Erie, PA 16501  
814-454-1500

TAKEN BY: Plaintiff

REPORTED BY: Toni Rennebeck, RPR  
Notary Public  
NMR Reference No. 052306B

ORIGINAL



1 Q. Are you aware of any Norfolk Southern safety  
2 policy that would apply to children that are  
3 repeatedly found in an area adjacent to your  
4 railway as you're traveling through the area?

5 A. No.

6 Q. So it would be fair to say you were never given  
7 any training in that regard?

8 A. That's correct.

9 Q. Have you ever operated a train in a similar  
10 location where the tracks were on a residential  
11 street?

12 MR. TAFT: Object to form.

13 Go ahead. You can answer it if  
14 you're able to.

15 A. Repeat that one more time.

16 BY MR. SOLYMOSI:

17 Q. Are there any other locations on which you  
18 operated a train that were similar to the  
19 conditions on West 19th Street between State and  
20 Cranberry?

21 A. No.

22 Q. Are you familiar with the term attractive  
23 nuisance?

24 A. No.

25 Q. Do you have regular safety meetings?

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NORFOLK SOUTHERN CORPORATION  
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COMPANY, INC.,

Defendants.

CIVIL ACTION  
NO. 05-101 ERIE

DEPOSITION OF: DAVID C. MORGAN

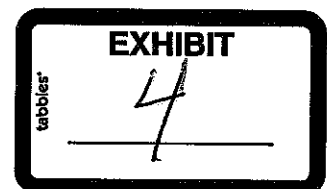
DATE: May 23, 2006  
Tuesday, 9:45 a.m.

LOCATION: Segel & Solymosi  
818 State Street  
Erie, PA 16501  
814-454-1500

TAKEN BY: Plaintiff

REPORTED BY: Toni Rennebeck, RPR  
Notary Public  
NMR Reference No. 052306

ORIGINAL



1 exposed ties on 19th Street at the time of this  
2 accident, wouldn't you?

3 A. That is correct.

4 Q. Okay. So how would a trespasser know when he's  
5 trespassing onto your property?

6 A. When he's grabbing onto equipment that's on our  
7 right-of-way, definitely he's trespassing.

8 Q. Well, where would someone be if they were  
9 grabbing onto your equipment; particularly  
10 someone like Robin Nixon? You would agree with  
11 me that he wasn't between the rails when he  
12 grabbed on?

13 A. He's grabbing onto our property.

14 Q. I understand that. My question is when he  
15 grabbed on and --

16 You understand that he was riding on  
17 his bike?

18 A. That's what I understand.

19 Q. And that he had grabbed onto the side of one of  
20 the cars.

21 A. Yes.

22 Q. And was being pulled along.

23 A. Yes.

24 Q. You'd agree with me when he was in the process  
25 of doing that, he wasn't between the rails on

1 your right-of-way.

2 A. That's correct.

3 Q. He would have had to be somewhere to the north  
4 of your north rail.

5 A. That's correct.

6 Q. Do you have any idea how far north he was of the  
7 north rail?

8 A. No.

9 Q. Had you ever in your whole career ever heard of  
10 a child or a person grabbing onto a rail car in  
11 the manner Robin Nixon did and being towed  
12 along?

13 A. No.

14 Q. Never heard of that?

15 A. No.

16 Q. Would it surprise you that we have many  
17 witnesses that lived in that area that are going  
18 to testify that it was a daily occurrence on  
19 those tracks?

20 A. That's -- I don't know. I mean, I'm just  
21 telling you what I know.

22 Q. So that doesn't surprise you though, given that  
23 you were there dozens of times to observe the  
24 territory and the conditions?

25 A. Right. I'm just saying I never observed it.

1 Whether or not someone else did, I can't testify  
2 to what they saw or did.

3 Q. Okay. And just to make sure I understood your  
4 testimony, you said that you did discuss or you  
5 did have discussions with crossing watchmen in  
6 the years that you were trainmaster for that  
7 area, but you never discussed any concerns about  
8 children and safety along the tracks with them?

9 A. That's correct.

10 Q. Did you ever discuss with anybody concerns with  
11 children and their safety when they were in the  
12 areas adjacent to the track?

13 A. Not that I recall.

14 Q. Wouldn't that be one of your responsibilities as  
15 a trainmaster?

16 A. I'm responsible for the operation of the trains  
17 and engines. If people were laying on the  
18 track, I mean, I've had people do that. But if  
19 there was a problem that was brought to me, I  
20 would certainly attempt to address it.

21 Q. I'm going to show you a document. It says it's  
22 a Conrail Transaction. Norfolk Southern  
23 Benefits, Safety, Environmental and Community  
24 Benefits Prepared by Norfolk Southern  
25 Corporation with a date of February 1998.

1 anything to prevent the accident?

2 A. No.

3 Q. Why?

4 A. I just don't believe the railroad could have  
5 done anything. If he would have not trespassed  
6 and grabbed our equipment as we went through,  
7 then he would have not have gotten hurt.

8 Q. You said earlier that this was a unique  
9 situation with a train running down the center  
10 of a city street; correct?

11 A. Yeah. As far as I'm aware of during my places  
12 I've been on the railroad during my career, yes.

13 Q. Are there any other places that were similar to  
14 this that you've seen outside of Erie with a  
15 similar situation?

16 A. No.

17 Q. Are you familiar with any safety precautions or  
18 things that can be done on what -- I know that  
19 Roger is going to object to me referring to it  
20 as a shared roadway but --

21 MR. TAFT: I'm going to continue to  
22 object. Why don't you just call it West 19th  
23 Street because it is not a shared roadway and  
24 he's testified to that.

25 BY MR. SOLYMOSI:



1 Q. Are you familiar with the term shared roadway  
2 with respect to trains?

3 A. See, the problem is we cross a lot of crossings.  
4 Are you saying we share the crossing? We share  
5 the right-of-way with the crossing?

6 Q. No, I'm talking about a situation where you have  
7 perpendicular with the flow -- not perpendicular  
8 -- parallel with the flow of the train and the  
9 tracks, what I understand that there's a term of  
10 art out there in the railway world that there  
11 are shared pathways, shared roadways where  
12 trains and pedestrians, vehicles, bicycles  
13 travel in a parallel direction on the same  
14 roadway.

15 You're not familiar with that term or  
16 that concept?

17 A. Actually, no. I'm saying we have a  
18 right-of-way. Now, once we go through, vehicles  
19 can go back and forth, people can go back and  
20 forth. When we are going through, a vehicle can  
21 be on the north side and a vehicle can be on the  
22 south side and go in the same direction or in  
23 the opposite direction, but they aren't sharing  
24 the same spot at the same time.

25 Q. Well, I think that's obvious. If they are,

1           there's going to be a collision; right?

2   A.   Right.  So, I mean, the term shared roadway, I  
3       mean, we have our right-of-way through there  
4       that we use, and once we get through, then other  
5       people can cross there, yes, if that's what you  
6       mean.

7   Q.   You'd agree that when we talk about the roadway,  
8       we're talking about the area curb to curb that  
9       contains a pathway for vehicles traveling west  
10      -- and when I say vehicles, I mean autos or  
11      bicycles --

12  A.   Right.

13  Q.   -- and vehicles and bicycles traveling east  
14      adjacent to the tracks that are in the center of  
15      the roadway; right?

16  A.   Yeah.

17  Q.   Okay.  And you're telling me that it was  
18      possible at the time for vehicular traffic to be  
19      on that same roadway at the same time that the  
20      train was traveling down the center of the  
21      roadway on its right-of-way.  Is that a fair  
22      statement?

23  A.   You're going to have to repeat that one again.

24  Q.   You told me earlier that it was possible for  
25      vehicles to be traveling on the roadway on West

1 19th Street at the same time a train was  
2 traveling on West 19th Street.

3 A. Oh; that is correct, as a train is traveling on  
4 the right-of-way, a vehicle can go beyond the  
5 north side and on the south side.

6 Q. Okay. And you're aware of that being possible  
7 at the time and prior to this accident.

8 A. Yes.

9 Q. Okay. But is it fair to say that you're not  
10 aware of any safety policies concerning  
11 situations such as that where cars or bicycles  
12 can travel parallel to the tracks on a roadway  
13 that is utilized by both the train and  
14 automobiles or bicycles?

15 A. That's correct.

16 Q. You're not aware of any safety program or  
17 policies or --

18 A. No.

19 Q. -- designed criteria for a situation like that?

20 A. No.

21 Q. And you're not aware of any studies that the  
22 railroad may have undertaken in that regard?

23 A. That's correct.

24 Q. Are you aware of any studies that the railroad  
25 undertook related to the removal of those

1 Q. Will you admit that this is a dangerous type of  
2 operation when trains run in the center of a  
3 street at low speed?

4 MR. TAFT: Objection to form. Define  
5 dangerous.

6 BY MR. SOLYMOSI:

7 Q. Well, would you consider the conditions as you  
8 knew them to be on West 19th Street with the --  
9 like we talked about earlier, with the vehicles  
10 other than the trains being able to travel  
11 alongside the train even when the train was  
12 running, including people on bicycles, would you  
13 consider that to be a dangerous situation?

14 A. As long as everyone complied with the law, the  
15 railroad, as well as any individuals, then, yes,  
16 it is a safe operation.

17 Q. Do you have any children?

18 A. Yes, I do.

19 Q. Do you think that young children are capable of  
20 always observing the rules?

21 A. No. Just like adults aren't always capable of  
22 observing the rules.

23 Q. Do you think that a child is as capable as an  
24 adult when it comes to understanding the dangers  
25 alongside a railway?

1 A. Some children are. My children have been  
2 exposed to railroads that they may be more aware  
3 of the dangers than other kids, but it is up to  
4 the parents to supervise their children. I  
5 mean, that's the way it is.

6 Q. So do you agree or disagree that that situation  
7 was dangerous or not for pedestrians or cars?

8 A. No. If everyone obeyed the law, there were no  
9 dangers.

10 Q. And is that why you didn't undertake any efforts  
11 to make sure that children would not be near the  
12 train while the train was going by?

13 A. That's correct.

14 Q. Is it because you assume that if people follow  
15 the rules, it wouldn't be dangerous?

16 A. Well, you have to assume that people will obey  
17 the law, just like I have to assume that a train  
18 will stop for a stop signal or a car will stop  
19 for a stop signal.

20 Q. Then would it be correct that you don't believe  
21 the railroad needs to do anything to try to  
22 prevent this type of an accident from happening?

23 A. I really can't answer that.

24 Q. Why not?

25 A. I mean, I -- we --

1 Q. Do you understand the question?

2 A. Say that again.

3 MR. SOLYMOSI: Read it back, Toni.

4 THE WITNESS: Yeah, read it back to  
5 me.

6 - - - -

7 (The record was read back by the Reporter.)

8 - - - -

9 A. Well, the railroad does -- we have Operation  
10 Lifesaver programs and we have people that go  
11 out to schools, local communities, talk about  
12 the dangers of trespassing on railroad property.  
13 And I'm sure there was probably something on TV  
14 in the area. There is an educational campaign.  
15 And that's a way for the railroad to get  
16 information out to the public to say, hey, you  
17 know, I mean, obey the law or you could get  
18 hurt.

19 BY MR. SOLYMOSI:

20 Q. So do you know what steps were taken in that  
21 regard for this particular area and this  
22 particular condition that we've been talking  
23 about?

24 A. Specifically, no.

25 Q. And you agree you didn't do anything about it.

1 A. That's correct.

2 Q. Who's in charge of this Operation Lifesaver in  
3 your company?

4 A. Operation Lifesaver -- we have a coordinator for  
5 the State of Ohio for all railroads out of  
6 Columbus, and then there's different volunteers  
7 within all the railroads, whether it be Norfolk  
8 Southern CSX that are trained to go out to  
9 schools and trucking companies and so forth and  
10 give presentations.

11 Q. And this is part of that Operation Lifesaver you  
12 were talking about?

13 A. That's correct.

14 Q. Have you ever been at any presentations for  
15 Operation Lifesaver?

16 A. Yes.

17 Q. What and where if you can remember?

18 A. Oh, I've been to a trucking company in Fairview,  
19 Ohio -- or Fairview, Pennsylvania.

20 Q. What trucking company?

21 A. I do not recall. I don't even remember it was  
22 so many years ago.

23 Q. Okay.

24 A. I've been in Conneaut High School driving class.

25 Q. Driving class?

1 A. Yeah, driver's ed.

2 Q. Okay.

3 A. Maybe I've been in some others, but I just don't  
4 recall.

5 Q. Have you ever been to any that would have  
6 addressed the safety issue of kids on bicycles  
7 where there's a paved roadway that's adjacent to  
8 the tracks?

9 A. No.

10 Q. And you've never participated as a presenter in  
11 Operation Lifesaver, have you?

12 A. Yes.

13 Q. Oh.

14 A. At the driver's education and at this trucking  
15 company.

16 Q. Oh, okay, I didn't realize that you were  
17 actually presenting.

18 A. Yes.

19 Q. Okay. And did you have any written materials or  
20 anything that you gave out?

21 A. Yeah, Operation Lifesaver materials.

22 Q. That's not something that Norfolk Southern  
23 produces?

24 A. No.

25 Q. Operation Lifesaver, is it an independent



1 organization? Do you understand who they are?

2 A. It's been a while since I've been involved with  
3 it, but I guess the railroads contribute to this  
4 organization, this Operation Lifesaver,  
5 Incorporated. And then they do the education,  
6 the training, and so forth.

7 Q. Did you ever have any contact with the City of  
8 Erie Police Department in the time that you were  
9 trainmaster prior to this accident?

10 A. Probably at other crossing accidents.

11 Q. Other than that, would it be fair to say that  
12 you never contacted them to address any concerns  
13 there might be with safety and children along  
14 the 19th Street tracks?

15 A. That's correct.

16 - - - -

17 (There was a discussion off the record.)

18 - - - -

19 BY MR. SOLYMOSI:

20 Q. I'm going to mark this as Exhibit 2 to your  
21 deposition. Could you identify that document?

22 - - - -

23 (The witness reviewed the document.)

24 - - - -

25 A. Yes, I can. It's a report that I completed.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBIN NIXON,  
Plaintiff,  
vs.  
NORFOLK SOUTHERN CORPORATION  
and NORFOLK SOUTHERN RAILWAY  
COMPANY, INC.,  
Defendant.

Deposition of AUGUST W. WESTPHAL

Thursday, May 17, 2007

The deposition of AUGUST W. WESTPHAL, called as a witness by the Defendants, pursuant to Notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Deborah L. Endler, a Notary Public in and for the Commonwealth of Pennsylvania, at the offices of MacDonald, Illig, Jones & Britton, LLP, 100 State Street, Suite 700, Erie, Pennsylvania, 16507, commencing at 9:40 o'clock a.m., the day and date above set forth.

COMPUTER-AIDED TRANSCRIPTION BY  
MORSE, GANTVERG & HODGE, INC.  
PITTSBURGH, PENNSYLVANIA  
412-281-0189



1 maintenance of the track or the ties per se?

2 A No, the track, the track and the ties are  
3 underneath the cement or the asphalt.

4 Q I just want to make clear when you are  
5 talking about failing to maintain a segment of track,  
6 you are not talking about the type of work the  
7 maintenance of weigh department does?

8 A No.

9 Q Okay. Is that the same for number 2,  
10 number 2 says "Norfolk Southern Railroad was negligent  
11 in the maintenance of West 19th Street track located  
12 within a residential and industrial area." What do  
13 you mean by that?

14 A That's correct, they didn't do anything to  
15 try to prevent any type of accidents by having any  
16 kind of a program to deter the children from playing  
17 next to the tracks and where trains are moving along.

18 Q My understanding from your report is that  
19 you and Mr. Guarino agree that what should have  
20 happened was the installation of these rumble strips  
21 and the painting of signs indicating "DANGER-NO BIKES"  
22 between the rails; is that right?

23 A That's what could have been done. And  
24 that's what was in my report what should have been  
25 done.

1 Q Right. So when we are referring to items 1  
2 and 2, that's what you are referring to?

3 A No, no, the railroad did absolutely  
4 nothing, Mr. Taft.

5 Q Well, show me, in addition to telling me,  
6 that the rumble strips should have been installed and  
7 that the signs should have been put between the rails  
8 stating "DANGER-NO BIKES," where in your report are  
9 you telling me that something else should have been  
10 done --

11 A Down on one of the --

12 Q -- to maintain the tracks?

13 A In number 13.

14 Q Are you on opinion 13?

15 A Yes.

16 Q I'm not there yet. I'm on 1 and 2.

17 A Well, we are jumping around here.

18 MR. SOLYMOSI: You just asked him to show  
19 you elsewhere in the report.

20 MR. TAFT: Okay, 13 is installing the  
21 rumble strips.

22 MR. SOLYMOSI: Install and maintain.

23 Q Right, we talked about those already.

24 A No, we haven't really talked about them  
25 yet. We just mentioned them and you gave me that

1 exhibit.

2 Q Okay. All right.

3 A And then we jumped to something else.

4 Q All right. So we got rumble strips. And  
5 we got signage that should have been put down between  
6 the rails; correct?

7 A Well, in my report it says what could have  
8 been done.

9 Q Yeah. There is a heading "What Should Have  
10 Been Done"?

11 A Yes.

12 Q In which you state rumble strips and  
13 warnings?

14 A Yes.

15 Q That's what you are claiming should have  
16 been done?

17 A But you were talking about opinions 1 and  
18 2, and I explained at that time that the railroad did  
19 absolutely nothing to prevent kids from running around  
20 that track irregardless of the fact that they had  
21 crossing watchmen there that seen the kids there.

22 Q Okay.

23 A They testified that they seen kids riding  
24 on the cars, or grabbing onto the cars.

25 Q But here is what's confusing to me. When

1 you are saying we failed to maintain the segment of  
2 railroad or we were negligent in maintenance of the  
3 West 19th Street track, are you talking about the  
4 failure to install rumble strips and the failure to  
5 install signs?

6 A No, I'm talking about the railroad failed  
7 to maintain the -- maintain the track between West  
8 19th Street in a condition that would have prevented  
9 accidents. That does not -- maintain keeps track of  
10 the entire track, not the ties or the ballasts or  
11 anything like that. They didn't maintain any kind of  
12 -- they didn't schedule any kind of action by the  
13 railroad to prevent kids from playing on the tracks.

14 Q Such as what?

15 A What?

16 Q Such as doing what besides putting these  
17 rumble strips in or signs?

18 A You always jump back to the rumble strips.  
19 I'll get to that -- you want to go to that now?

20 Q No, I don't. Because I just want to make  
21 sure that I understand what you are contending under 1  
22 and 2.

23 A And I explained that.

24 Q No --

25 MR. SOLYMOSI: That's been --

1 Q Not to my understanding.

2 MR. SOLYMOSI: That's been asked and  
3 answered.

4 MR. TAFT: I don't think it has.

5 Q What program have you identified in here,  
6 besides rumble strips and signs between the tracks  
7 that you claim Norfolk Southern should have done to  
8 maintain that segment of the railroad?

9 A To maintain that stretch of the railroad  
10 meant in this condition, put it in perspective of the  
11 injury to kids or injury to anybody, Norfolk Southern  
12 Railroad did absolutely nothing to prevent any kind of  
13 accidents on that property by putting up signage or  
14 anything, but yet they had crossing watchmen there on  
15 certain days that admittedly seen kids catching on and  
16 playing around the tracks. But they did nothing.  
17 They did not report them to their superiors.

18 Those people never had any training by  
19 Norfolk Southern of what to do when they seen kids out  
20 there. So absolutely, they did absolutely nothing to  
21 maintain that track in a safe condition along West  
22 19th Street.

23 Q I guess you mentioned it before, you are  
24 saying they should have notified the City Police?

25 A The standard in the industry, they should

1 have notified their superiors.

2 Q Then what?

3 A Then their superiors, the dispatcher or  
4 their superiors would notify the police or the  
5 railroad police, if they had them, and usually Norfolk  
6 Southern had railroad police, and then they would  
7 notify the Police Department Erie, Pennsylvania, that  
8 there are children playing down along our tracks.

9 Q And then what?

10 A We would like to have you come down, see if  
11 you can do something about it. Then it would be the  
12 City of Erie responsibility to follow up on that. And  
13 then somebody from the railroad should have followed  
14 up, a train master or somebody should have followed up  
15 and seen are they doing anything to prevent kids from  
16 playing around the tracks and trains when they go  
17 through town.

18 Q Well, are you contending that the police,  
19 if they had been notified, should have stationed  
20 people there in case some kid like Robin Nixon came  
21 along on a Sunday?

22 A I didn't say that. You are putting those  
23 things --

24 MR. SOLYMOSI: Roger, I'm going to object.

25 That's been asked and answered. If you are going



1 to ask it again, you are going to need a Court  
2 Order to get him to answer it again. It's clear  
3 what he said here. He said it and it's been  
4 answered.

5 MR. TAFT: It's not clear and I'll be happy  
6 to move on. The transcript will speak for  
7 itself.

8 Q Item 4 or opinion 4 says "Norfolk Southern  
9 was negligent in the operation of trackage on West  
10 19th Street in a manner that totally disregarded the  
11 presence of children who were known to play on or near  
12 and near the tracks." Is that the same as the first  
13 three?

14 A No, this is different.

15 Q Okay. What's this?

16 A "Norfolk Southern Railroad was negligent in  
17 the operation of trackage." Now, the operation would  
18 mean a train going down the track and the people  
19 assigned to that train, Mr. Price and Mr. Glenn, did  
20 absolutely nothing, admitted that they didn't have any  
21 responsibility to look on either side or to notify any  
22 children or anything.

23 The standard in the industry is to those  
24 employees on the train have to be vigilant and alert.  
25 Any time they see children playing around the tracks

1 or around in the area, they are to notify the train  
2 dispatcher and they in turn will notify the City of  
3 Erie Police. It's the standard in the industry.

4 Q Well, Mr. Westphal, instead of talking  
5 about the standard in the industry all the time, what  
6 did you see in the materials that you reviewed very  
7 carefully that led you to believe that Robin Nixon  
8 would have been visible to anyone on that train crew  
9 on the Sunday morning, April 27, 1997?

10 A Well, they went by, they were by already.  
11 My understanding they were by that point already.

12 Q Right.

13 A They wouldn't have seen him.

14 Q They wouldn't have seen him at all. So if  
15 they didn't see him, what would that train crew have  
16 been able to do to have avoided Mr. Nixon's accident  
17 because they never saw him?

18 A Mr. Taft, it's not just Robin Nixon. It's  
19 all children around in there. The engineer and  
20 conductor, Glenn and Price, did absolutely nothing to  
21 warn any, at any time they admitted that they didn't  
22 do anything. Like they were going down there with  
23 blinders on, like they didn't even have to look out  
24 the window to see where they were at. It was a total  
25 disregard for safety.

1 Q On the morning of the accident they had  
2 already gone through by the time he showed up?

3 A I answered that already.

4 Q Okay. Let's go to number 5. You opine  
5 that "Norfolk Southern Railroad was negligent in the  
6 operation of the trackage at West 19th Street by  
7 failing to display any signage to warn children of the  
8 danger of playing on or near railroad tracks." Now,  
9 are we now to putting of the signs that Mr. Guarino  
10 references in his report?

11 A No, because at the time of this accident  
12 they didn't have any signs up there.

13 Q But is your contention in this opinion that  
14 Norfolk Southern should have installed the signs that  
15 Mr. Guarino referenced in his report "DANGER-NO BIKES"  
16 between the rails?

17 A Yes, that would have added to it, in my  
18 opinion, those signs that Mr. Guarino put big letters,  
19 24 inches high and yellow strip across and rumble  
20 strips down the side would have been a great deterrent  
21 from those children playing on the tracks.

22 Q But that's the signage that you are  
23 referring to in opinion 5?

24 A No, no, no, no, no, no, you brought that  
25 up.

1 Q You tell me, then, Mr. Westphal, what  
2 signage are you referring to in No. 5--

3 A The railroad company has big signs, they  
4 say "No Trespassing," "Keep Away," "Trains Moving."  
5 They have a national program that's Operation Life  
6 Safer that they go to schools and they teach kids stay  
7 away from railroad tracks. Of course, they didn't  
8 participate in that here. Norfolk Southern didn't  
9 participate in that. I didn't see anything on that.

10 Q You didn't ask one way or the other, did  
11 you?

12 A It was in the report that I guess Robin  
13 Nixon he said that nobody ever come to my school and  
14 told us about that.

15 Q So --

16 A But to get back to your question, they have  
17 signs that say "stay away from the trains" and they  
18 could have put up other signs when they knew the  
19 children were up and down there. They could have put  
20 up signs up there that had an "X" on them, children on  
21 bicycles or something like, stay away from the trains.

22 Q Mr. Westphal, let's get to a real basic  
23 fact, isn't it true that West 19th Street is a public  
24 street?

25 A It's a public street with the Norfolk

1 Southern tracks running right down the middle.

2 Q Isn't it true that the Norfolk Southern  
3 right-of-way runs from end of tie to end of tie on  
4 that track line?

5 A It would depend upon what the negotiation  
6 were for installing that track.

7 Q Well --

8 A But I agree with you.

9 Q Yeah, you read the deposition transcripts  
10 carefully, and isn't it a fact that the undisputed  
11 testimony is that the Norfolk Southern's right-of-way  
12 only was from end of tie to end of tie through the  
13 middle of 19th Street?

14 A Yes.

15 Q And isn't it true because it's undisputed  
16 that the rest of 19th Street was a public street owned  
17 and maintained by the City of Erie; correct?

18 A Yes, that would not have prevented them  
19 from putting up a sign up there and putting signage up  
20 that I mentioned before, but they didn't do it.

21 Q Signage on someone else's property?

22 A Put them up on the side or on the telephone  
23 pole. They do that.

24 Q Wait a minute now. You are suggesting that  
25 Norfolk Southern put big signs up on someone else's

1 property; is that right?

2 A Well, no, just put up a sign, put up a sign  
3 up on a post.

4 Q Okay, now, keep in mind, Norfolk Southern's  
5 property --

6 A I know what, where you are getting at.

7 Q So you want Norfolk Southern to post signs  
8 on someone else's property?

9 A Just put them on a telephone post. They  
10 can get permission. If Norfolk Southern was aware of  
11 the fact and wanted to do anything about it, they  
12 could go to the City and say would you mind if we put  
13 up a sign to protect the children in your city from  
14 staying away from our trains. I don't think Norfolk  
15 Southern or the City of Erie would say, oh, no, don't  
16 do that, we don't care about our children.

17 Q Is it your understanding the City of Erie  
18 knew nothing about children in the vicinity of these  
19 tracks before this accident?

20 A Well, I don't know really.

21 Q Okay.

22 A Norfolk Southern never reported it to them.

23 Q And so as far as you know, the City had no  
24 knowledge of this?

25 A Norfolk Southern never reported it to them.

1 Q Okay.

2 A Because those are the ones, those are the  
3 ones get damaged because of the total ignorance of  
4 this crew not knowing anything about it. Hardly  
5 anybody knew about it. It goes back to the lack of  
6 training.

7 Q Let's go to No. 12. "Norfolk Southern was  
8 negligent in that it is clear following my review and  
9 research of the operating rules as above outlined,  
10 Norfolk Southern Railroad through its employees  
11 exhibited a complete disregard for a risk which was  
12 clearly known to them." Is that what you have been  
13 testifying to before?

14 A Yes.

15 Q Are you contending that on April 27, 1997,  
16 the Norfolk Southern crew in that train was aware that  
17 Robin Nixon had grabbed onto that train?

18 A I didn't say that.

19 Q Well, is that your contention?

20 A No, no. They were not -- we went over this  
21 before. But my --

22 Q Let's go on to --

23 A Wait a minute. My contention is that  
24 following my review of this, the operating rules, they  
25 were totally ignorant of the operating rules and their

1 responsibilities to protect the public, to do anything  
2 to protect the public or whether it was Robin Nixon or  
3 any other child along there from getting injured on  
4 that track.

5 Q Let's go to No. 13. "In my opinion the  
6 annual cost of \$3,500 to install and maintain rumble  
7 strips along the area of West 19th Street where the  
8 accident occurred would have been a small and  
9 reasonable expense compared to the risk presented by  
10 Norfolk Southern Railroad to children in the area."  
11 Right?

12 A That's what it says.

13 Q That's your opinion?

14 A Yeah.

15 Q And that ties in with Mr. Guarino's report  
16 that you agree with that these rumble strips should  
17 have been installed?

18 A Yes, and I'll point out that the  
19 installation, they had three or four, say there was  
20 ten crossings in that 1.2 miles there. If they didn't  
21 have any crossing watchmen, it would have cost the  
22 railroad company to put in grade crossing protection  
23 at all those places a minimum of \$12,000 for crossing  
24 protection. And that's \$120,000. That's for one  
25 installation and they still have the maintenance.



1           According to Mr. Guarino's recommendations,  
2 the \$3,500 to install and maintain these rumble strips  
3 per year would have been a small amount compared to  
4 what they would have had to have done if they really  
5 wanted to protect the people.

6           Q       It's your opinion that those rumble strips  
7 would have prevented Mr. Nixon's accident?

8           A       They would have been a deterrent for all  
9 children, all bicyclists that wanted to do something  
10 like that.

11          Q       I'm talking about Mr. Nixon. You think it  
12 would have prevented Mr. Nixon's accident?

13          A       I believe it would have.

14          Q       And 14 says that "It's your further opinion  
15 that the conduct of Norfolk Southern Railroad through  
16 its employees, engineer Timothy J. Price and conductor  
17 Robert B. Glenn above referenced directly and  
18 proximally contributed to the serious injury to Robin  
19 Nixon on April 27, 1997 on the West 19th Street track  
20 at Erie, Pennsylvania." What conduct are you  
21 referring to?

22          A       Of their total disregard for people around  
23 the tracks.

24          Q       On the day of the accident or before?

25          A       On any crew, they exhibited that in their

1 instance on April 27th. But any crew, the railroad  
2 company should, the Norfolk Southern Railroad company  
3 should have had some responsibilities and training and  
4 getting it through the whole procedure as I've  
5 explained 7 or 8 times now the whole procedure to keep  
6 children away from trains. They did absolutely  
7 nothing.

8 Q Your contention is not with the way they  
9 ran the train that day, your contention is with their  
10 failure to follow these rules that you mentioned  
11 before and report that there were children in the area  
12 on various occasions?

13 A Well, their whole operation of the train.  
14 The train, Mr. Price was operating the engine and that  
15 moved the train. But their total disregard for people  
16 around the railroad was a sample, must have been a  
17 sample of all their employees.

18 Q That's your assumption?

19 A Yes.

20 Q Do you agree with Mr. Guarino that these  
21 rumble strips should have been the same type that were  
22 installed on interstate highways?

23 A I concur with his report.

24 Q Okay. And do you agree that the rumble  
25 strips that are installed on interstate highways are

1 for the purpose of waking up drowsy drivers?

2 A Yes, to warn a driver that he is off the  
3 road.

4 Q And --

5 A And Mr. Guarino had put out a nice thing in  
6 his report, if I could find it here, that really, he  
7 had a picture in there that showed exactly how the  
8 patch strips would have been better, would have been  
9 his recommendation.

10 MR. SOLYMOSI: Here.

11 THE DEPONENT: Yeah, this is what it is.

12 Q Would you agree with me that the  
13 recommendation Mr. Guarino made, that you concur with,  
14 would require those rumble strips to be installed on  
15 the City street and not on the railroad right-of-way?

16 A Well, there would have to be some  
17 arrangement made between the City and the railroad,  
18 but the actual -- that could be worked out. I don't  
19 think that the City of Erie, Pennsylvania, is going to  
20 say no, you can't put that on our street, that might  
21 prevent an injury to a child. But I seriously believe  
22 that that could be worked out between the City. But  
23 it would have been an indication that they were doing  
24 something to protect children from riding bikes on  
25 there.

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA  
3 - - -  
4 ROBIN NIXON, )  
5 Plaintiff, )  
6 vs. ) No. 05-101ERIE  
7 NORFOLK SOUTHERN CORPORATION and )  
8 NORFOLK SOUTHERN RAILWAY COMPANY, )  
9 INC., )  
10 Defendants. )

11 Deposition of ROBIN NIXON  
12 Friday, March 24, 2006  
13 - - -

14 The deposition of ROBIN NIXON, the plaintiff  
15 herein, called as a witness by the defendants,  
16 pursuant to notice and the Federal Rules of Civil  
17 Procedure pertaining to the taking of depositions,  
18 taken before me, the undersigned, Lance E. Hannaford,  
19 a Notary Public in and for the Commonwealth of  
20 Pennsylvania, at the offices of MacDonald Illig Jones  
21 & Britton, 100 State Street, Suite 700, Erie,  
22 Pennsylvania 16507, commencing at 9:35 o'clock a.m.,  
23 the day and date above set forth.

24 - - -  
25 COMPUTER-AIDED TRANSCRIPTION BY  
MORSE, GANTVERG & HODGE, INC.  
PITTSBURGH, PENNSYLVANIA  
412-281-0189  
- - -

EXHIBIT

tabbles

6

1 A Hand brakes.

2 Q That helps.

3 As you were being pulled along, holding on  
4 to the handle with your right hand, left hand on the  
5 left handlebar of your bike, where was Mr. Houston?

6 A In front of me.

7 Q Was he riding his bike in front of you? Or  
8 was he also holding on to the train?

9 A He was also holding on to the train.

10 Q When did Mr. Houston first grab on to the  
11 train?

12 A Right before me.

13 Q Now, you were holding on to a handle near  
14 the rear of one of these rail cars.

15 Correct?

16 A Correct.

17 Q What was Mr. Houston holding on to?

18 A I am not sure.

19 Because he was two cars ahead of me.

20 So I couldn't exactly see what he was  
21 holding on to.

22 Q He was, to your best recollection, two rail  
23 cars farther toward the head end or front end of the  
24 train than you were?

25 A Correct.

1 Q But you could see him holding on to  
2 something?

3 A Correct.

4 Q Could have been a handle on that car or  
5 something else?

6 A Correct.

7 Q You don't know?

8 A I don't know.

9 Q To your best recollection, when did he  
10 first grab on to the train?

11 A Right before me.

12 Q Am I correct in understanding that these

13 rail cars, that you and Mr. Houston were holding on  
14 to, starting somewhere, to your best recollection, to  
15 the west of Myrtle Street, were toward the rear of the  
16 train?

17 A I am not exactly sure.

18 Q You don't recall one way or the other; is  
19 that right?

20 A Right.

21 Q At any time, did you see the locomotive of  
22 that train go past?

23 A I am not exactly sure.

24 Q You do remember seeing the train itself  
25 moving past.

1 A Yes.

2 I do.

3 Q But you don't recall seeing the locomotives  
4 of the train?

5 A No.

6 I don't recall.

7 Q At any point in time before you had your  
8 accident, did Mr. Houston let go of the train?

9 A No.

10 Q So your best recollection is that  
11 Mr. Houston was continuing to hold on to this rail car  
12 two cars ahead of you.

13 ~~And continued to hold on the entire time up~~  
14 until you fell?

15 A Correct.

16 Q Mr. Nixon, before this accident, had your  
17 parents ever told you to stay away from moving trains?

18 A No.

19 They hadn't.

20 Q They never told you once that you ought to  
21 stay away from a moving train?

22 A No.

23 They hadn't.

24 Q Did anybody in school ever tell you to stay  
25 away from moving trains, they are dangerous?

1 A No.

2 They hadn't.

3 Q So you didn't know that at all?

4 A No.

5 Q Do you recall approximately where it was,  
6 when you fell off your bicycle?

7 A No.

8 I don't.

9 Q Do you have a recollection today of the  
10 accident happening?

11 A Yes.

12 I do.

~~13 Q Do you know whether you fell off your~~  
14 bicycle somewhere in the vicinity of the Sassafras  
15 Street intersection?

16 A Yes.

17 I did.

18 Q And again, as you best recall it,  
19 Mr. Houston was still continuing to be pulled along by  
20 the train two cars in front of you, when you fell?

21 A Yes.

22 Q Mr. Nixon, I am not saying that art runs in  
23 the family.

24 A It doesn't.

25 Q Just because your brother attends an art



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A. W. WESTPHAL  
President

February 16, 2007

Mr. Tibor Solymosi, Esquire  
**SEGAL & SOLYMOSI**  
Attorneys at Law  
818 State Street  
Erie, Pennsylvania 16501

**Re: Robin Nixon vs. Norfolk Southern Corp.**

Dear Mr. Solymosi:

**BACKGROUND AND EXPERIENCE**

I, August W. Westphal, am a railroad safety expert. I have considerable experience (fifty-four years) in the railroad industry. I have performed service as both Freight and Passenger Conductor/brakeman – Foreman/Switchman both in over the road and Yard/Terminal Operations. Also, I have worked jointly with the representatives of the American Association of Railroads (AAR), Federal Railroad Administration (FRA), National Transportation Safety Board (NTSB), and Rail Labor Organizations (BLE, B of MWE, BRC and UTU) in handling safety activities on the nation's railroads. As a consultant I have participated in 14 cases involving children in railroad accidents. In one of them it involved a child with a bicycle.

**ENGAGEMENT**

I was first contacted in this matter by Mr. Tibor Solymosi, Esquire on March 27, 2006 via telephone. This expert was requested to review the facts underlying the incident that occurred on April 27, 1997, conduct any necessary investigation and render opinions regarding the conduct of Norfolk Southern Corporation and its personnel.

**DOCUMENTS**

1. Complaint
2. Answers
3. Deposition Testimony of



*Westphal*  
*DEP EX. 6*

Member: National Association of Railroad Safety Consultants and Investigators

Mr. Tibor Solymosi, Esquire  
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4. Report of Investigation, Dennis Lagan & Associates
  5. Defendants Answers to Interrogatories
  6. Documents from Defendant Norfolk Southern re: Accident
  7. Police Report, Erie PA Police Department.
  8. Photos, West 19th Street, September 2002
  9. Erie, PA Police photos of Accident scene
  10. Photos – West 19<sup>th</sup> Street, March 2006
  11. Deposition Testimony of David C. Morgan, NS Trainmaster
  12. Deposition Testimony of Timothy J. Price, NS Engineer of train
  13. Deposition Testimony of Eugene Pandlis, Manager Claims Litigation
  14. Deposition Testimony of James F. Baskin, NS Supervisor of Track
  15. Deposition Testimony of Steve W. Frye, NS Claim Agent
  16. Deposition Testimony of Robert B. Glenn, Conductor of train
  17. Defendant NS Answers to Interrogatories –Second Set
  18. Norfolk Southern Railroad Safety and General Conduct Rules
  19. Norfolk Southern Operating Rules Effective July 2, 1995
  20. Deposition Testimony of Donald R. Cunningham, NS Laborer
  21. Deposition Testimony of Robert E. Rockey, NS Route Clerk and Crossing Watchman
  22. Deposition Testimony of Harvey H. Stone, President, Stone Consulting and Design Inc.
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23. Federal Highway Administration, Technical Advisory, Roadway Shoulder Rumble Strips
24. Federal Highway Administration, Synthesis of Shoulder Rumble Strip Practices and Policies
25. Norfolk Southern Six Point Action Plan for Safety of Operations
26. Expert Opinion of Guarino Enterprises, Rumble Strips near tracks

### FACTS

The train involved in the instant accident April 27, 1997 was a thru Train operating in an eastbound direction between Conneaut, OH and Buffalo, NY. The lead Unit of the three Unit power consist was NS 8669 followed by NS 6620 and Trailing Unit NS 8594 the train is identified as a Unit Coal Train No. Y47L1. The train consist was 150 loads and 00 empties with 7,225 tons traveling at a reported eight (8) miles per hour. The speed of travel is suspect in that the Engineer had advised the police the train was traveling at 15 MPH at the time of the accident to Robin Nixon.

The Norfolk Southern Train was operated with only a two (2) man crew, the Conductor and the Engineer. The Conductor was Robert B. Glenn who began his career in May of 1995 in Conneaut, OH. (Glenn P 7 L- 2) Strange as it may seem Mr. Glenn started his career as a Conductor with just on job training to qualify. Mr. Glenn worked with several Conductors and there was no certification as to his being qualified. (Glenn P8 L 6-10) This is very unusual in that generally speaking an employee in train service must have at least three (3) years experience as a brakeman/switchman prior to being eligible to qualify as a conductor. Extensive training and rule certification is required. The engineer was Timothy J. Price who began his career on the railroad in 1988 served in the capacity of brakeman/conductor until 1990 when he attended engineer schooling at McDonough, GA. (Price P -7 L 22-24)

Truly the actual experience and responsibility for operating a railroad train of 150 cars was lacking. Neither employee on the train seemed to be fully aware of their duties. Conductor Glenn indicated in response to a question as to who was in charge of the train, (Glenn P17 L 24-25) that it was a shared responsibility. While messages are generally addressed "C & E", the Conductor is the employee in charge of the train. The conductor is to be seated in the lead unit of the train, on a two man crew, and be vigilant and alert to what is on the left side of the train moving along the track. Conductor Glenn was not alert and vigilant when he said he observed nothing between State and Cranberry Street

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(Glenn P18 L 11-16) also, was not familiar with the area along the track where children may be sited inasmuch as he stated it was not part of his responsibility. (Glenn P 19 L 3-8) Mr. Glenn indicated his training was ongoing and was specific to the "operation and handling of equipment that we're on" (Glenn P 20 L 7-21) Conductor Glenn further indicated if children were not on the right-of-way and not inhibiting anything to do with our operation, then we were not trained to watch for children. (Glenn P 20 L-22-25 and P 21 L 1-5) Engineer Price was also limited in his knowledge of train operation. Critical to the operation of a train are many characteristics of the territory over which the train will be operated. Direction, terrain, grade, sidings and switch or yard locations and the area surrounding same are critical for a safe and efficient operation of a train. Engineer Price indicated his only concerns were the rail the grade and signals. (Price P8 L 17-19) It is strange to this expert engineer Price indicated he had no policy or training from the carrier NS insofar as watching for children who are repeatedly in the area of the track. (Price P 19 L 1-8) Neither Conductor Glenn or Engineer Price were familiar with or having knowledge of the Norfolk Southern Six Tenets of Safety. While Engineer Price was aware of one (1) speedometer Conductor Glenn was of the opinion there were two (2) speedometers in the locomotive unit. Neither Engineer Price or Conductor Glenn was aware of a children's playground in close proximity to the railroad tracks on west 19<sup>th</sup> Street in Erie, PA.

### DISCUSSION

Generally speaking the first indication of safety in all Railroad Operating Rules is "Safety is of the first importance in the discharge of duty" This mandate is very important to the train crew and all other employees on the railroad. Norfolk Southern Operating Rules GR-9(a) requires members of the crew must observe the condition of their train and inspect it at frequent intervals while it is moving. When practical, they will look back at the track frequently to see if damaged by dragging equipment and also at block signals and roadway structures to see if they have been struck by objects protruding from their train. Looking back and watching their train is a very important part of the crew duties. This is especially true since the crew members are all located on the power units of the train.

Observing the passing train is also the important responsibility of the employees who are adjacent to the train operation. In the instant accident to Robin Nixon there were Norfolk Southern Employees in advantageous positions to note the presence of children along the area of West 19<sup>th</sup> Street in Erie, PA. The use of Crossing Watchmen was in place at three locations along west 19<sup>th</sup> street and one in particular in the vicinity of the accident to

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Robin Nixon. The Crossing Watchmen were under the direct charge of James F. Baskin (Taft Answers to Interrogatories Second Set P-4)

It is unfortunate and significant that many of the employees who were in a position to note children in an area of danger next to moving freight cars were admittedly void of any required duty insofar as noting children in an area occupied by train traffic. Mr. Donald E. Cunningham was employed as a Crossing Watchman from 1971 to 1983 and following that date was a relief person for Crossing Watchmen who were on vacation or absent for a period of time. Mr. Cunningham indicates he had seen Children in the area and playing on the sidewalk. (Cunningham P 12 L 24-2) Contrary to looking for children Mr. Cunningham was taught to watch trains – that was our job. (Cunningham P13 L 23-1) To Mr. Cunningham's knowledge there were no Supervisors who ever talked to the Crossing Watchmen about children getting near the tracks and train operations. (Cunningham P14 L 22-2) In the number of years Mr. Cunningham worked as a Crossing Watchman he never paid any attention to children close to the tracks. The only reason his not being concerned being his keeping an eye on the trains. (Cunningham P14 L 3-9) The three crossings where Watchmen were employed were Cherry Street, Cascade Street and Cranberry Street (Cunningham P 15 L 12-14) the reason for the Watchmen was due to there being schools near the crossings. (Cunningham P 15 L 15-17) Mr. Cunningham was totally unaware of the Norfolk Southern Six Tenets of Safety. (Cunningham P17 L 3-8) On a different view of the responsibilities of the crossing watchman, Mr. Robert E. Rockey employed December 1, 1969 as a Route Clerk. (Rockey P 4 L 9) Mr. Rockey was employed as Extra Crossing Watchman for the period years '83, '84, '85 and '86 and in '93 came back to crossing watchman. (Rockey P 7 L 9-18) A PUC Order required a crossing watchman if so many students were to cross the tracks. (Rockey P 8 L 9-12) Our responsibility was to get the kids across the tracks and see that no one was injured. (Rockey P 8 L 17-21) In the year 2000 the tracks along West 19<sup>th</sup> Street were removed due to a change in operations to Conrail trackage. (Rockey P 9 L 20-24) While Mr. Rockey was working they would have safety training sessions. (Rockey P 13 L 3-4) The training was more of a Hazardous Materials (HAZ MAT) training session. If one would see a car with the HAZ MAT marking and you would see it leaking you would let the police or railroad know about it quickly (Rockey P13 L 6-16) Training was limited and very simple. The Watchman would watch another do his job and then catch on quickly. A basic thing. (Rockey P 14 L 1-17) There were no written instructions for the position of Crossing Watchman other than a notice in the shanty years ago. Do not know what happened to them (Rockey P 15 L 25-5 and L 8-10) Mr. Rockey had seen on a couple of occasions kids on bicycles being towed by the train. (P 17 L 1-6) In one instance Mr. Rockey pulled a kid away from the train and yelled at another and he stayed away. (Rockey P 17 L 7-10) There were no Supervisors present to report the incident to. One



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could only attempt to get a name and make a record of it in the event a Supervisor inquired. (Rockey P 17 L 14-22) Recalls that Supervisors may have come to the area and indicated what they should do in attempting to be aware of children near the tracks or trains running thereon. (Rockey P 18 L 4-16) Mr. James L. Baskins who was in charge of the Crossing Watchmen began his career with N&W Railroad a predecessor to Norfolk Southern. Mr. Baskins was a Terminal Supervisor for maintenance of way (Track) and was based in Conneaut, OH. Mr. Baskins personally inspected the track along west 19<sup>th</sup> Street on a weekly basis. (Baskins P 11 L 1-4) He clearly understood the job activity of the crossing watchmen in Erie, PA. (Baskins P 13 L 15-19) The inspections were made from a High Rail Vehicle which would give him a general look at the trackage and the area surrounding the track. (Baskins P15 L 8-9) Mr. Baskins was of the opinion the training of the crossing watchmen was only "on-job-training". To his knowledge there were no written instructions. (Baskins P17 L 9-13) The only training per se was at Conneaut, OH held by the Trainmaster and involved union employees. (Baskin P 19 L 7-19) In Mr. Baskins opinion there was not any concern by N&W or NS for the safety of children who may be near trains of the carrier. (Baskins P 22 L 11-16) Mr. Baskins could not recall any signage in the area to alert children of any danger. (Baskins P 22 L 17-20)

In the review of Depositions and/or statements from Norfolk Southern Railroad Officers employees it is strange and significant they were totally unaware of the Playground area along the tracks which would be occupied by children. On the other hand, each Officer and/or employee of the carrier was familiar with the Cemetery located in the area.

The investigation report filed in this matter reflects numerous witnesses from the populated area who were contacted and they reflected upon the serious situation of children playing in the area of train tracks. The numerous incidents reported would indicate there was a serious problem in the area of West 19<sup>th</sup> Street. It is unconscionable for the railroad to say they had no notice of children playing in the area. Train Crews and Officials of the carrier are charged with the responsibility of reporting such sightings to the train dispatcher and him, to the police of the city. There is no question the railroad knew or should have known of this serious and dangerous problem.

#### **WHAT SHOULD HAVE BEEN DONE**

Shoulder Rumble Strips (SRS) have been widely tested in many states to reduce accidents and alert drivers of the edge of the roadway. The Federal; Highway Administration has assembled data of this nature which includes the testing of bicyclists who travel on highways, etc. In 2000 the Pennsylvania Transportation Institute relied upon the project by Elefteriadou et al. to develop new SRS configurations that decrease the level of vibration experienced by bicyclists while providing an adequate amount of

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stimulus to alert inattentive or drowsy drivers. Six configurations were tested by 25 intermediate and advanced bicyclists. The researchers recommended the adoption of two new bicycle-tolerable rumble patterns, one for the non-freeway facilities operating near 88 kph (55 mph) and the other for those operating 72 kph (45 mph)

Mr. James A. Guarino of Guarino Enterprises has prepared a report on the cost, application and duration of installing striping, warning signs and rumble strips of a nature similar to and as outlined in the study above referred to. The plan submitted would allow the rumble strips to be placed along the 1.2 miles of track on West 19<sup>th</sup> Street from Peach Street to Raspberry Street. In my opinion the installation of rumble strips would have prevented children from riding bicycles along the side of the train and avoid injury as was sustained by Mr. Nixon. Also the installation of yellow strips along with signs between the rails indicting DANGER – NO BIKES would be an excellent deterrent. The cost of such installation would be estimated at \$7,920.80 This figure, \$7,920.80 is the initial cost and when averaged out, the cost per year would be approximately \$3,500.00 per year.

In my opinion the installation of the rumble strips would have prevented the condition which existed at West 19<sup>th</sup> Street in Erie, PA. When riding a bicycle myself I would always seek out a smooth area to ride. Avoiding any rough terrain and/or uneven ground was important. In my opinion any cyclist, young or older, riding along a street would completely avoid any contact with so-called rumble strips. The signage would also alert the rider to a dangerous area.

### **OPERATING RULES**

#### **General Rules**

Safety is of the first importance in the discharge of duty.  
Obedience to the rules is essential to safety.

- A. Employees whose duties are prescribed by these rules must provide themselves with a copy.
- B. Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, employees must apply to the proper authority for an explanation.

**GR-9(a)** Members of the crew must observe the condition of their train and inspect it at frequent intervals while it is moving. When practicable, they will look back at the track frequently to see if damaged by dragging equipment and

Mr. Tibor Solymosi, Esquire  
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also at block signals and roadway structures to see if they have been struck by protruding from their train.

**GR 27.** Undivided attention to duty is required. While on duty, employees must not engage in and activity that will interfere with or distract their attention from their work.

### **CONDUCTORS**

**581.** Conductors have charge of trains to which they are assigned and of all employees thereon. They are responsible for safe and proper management of their trains, for protection and care of passengers and property, for performance of duty by train employees, and for observance and enforcement of all rules and instructions.

**593.** Conductors will occupy a window seat in the operating compartment of the controlling lead unit of moving freight trains unless otherwise instructed by a division officer.

### **ENGINEERS**

**600.** Engineers are directly responsible to and must obey the orders of Division and Terminal Officers. Within shop limits they are under the direction of shop supervisors. They will obey the instructions of yardmasters and of their conductors with respect to the general management of their trains.

## **NORFOLK SOUTHERN SIX POINT ACTION PLAN FOR SAFETY OF OPEATIONS**

### **STATEMENT OF POLICY SAFETY**

1. All injuries can be prevented.
2. All exposures can be safeguarded.
3. Prevention of injuries and accidents is the responsibility of each employee.



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4. Training is essential for good safety performance.
5. Safety is a condition of employment.
6. Safety is good business.

### OPINIONS

1. Norfolk Southern Railroad was negligent in failing to maintain the segment of railroad known as the West 19<sup>th</sup> street track in a manner to prevent accidents which were known to occur.
2. Norfolk Southern Railroad was negligent in the maintenance of the West 19<sup>th</sup> street track located within a residential and industry area.
3. Norfolk Southern Railroad was negligent in maintaining the West 19<sup>th</sup> street track in a condition which would deter children from playing along the tracks.
4. Norfolk Southern Railroad was negligent in the operation of trackage on West 19<sup>th</sup> Street in a manner that totally disregarded the presence of children who were known to play on and near the tracks.
5. Norfolk Southern Railroad was negligent in the operation of their trackage at West 19<sup>th</sup> Street by failing to display any signage to warn children of the danger of playing on or near railroad tracks.
6. Norfolk Southern Railroad was negligent in failing to recognize the danger involved in placing a track structure in the middle of a city street and failing to install signage to warn of the danger that was present.
7. Norfolk Southern Railroad was negligent in failing to recognize the danger of placing railroad tracks within a residential and industry area and failing to install a type of rumble strip and warning signage between and along both sides of the track to prevent children from riding bicycles along the edge of the track and/or next to a moving train. The rumble strips would have prevented Robin Nixon's accident.
8. Norfolk Southern Railroad was negligent in failing to properly install and maintain proper warning striping along the street surface to warn children and traffic of there being dangerous railroad track in close proximity.

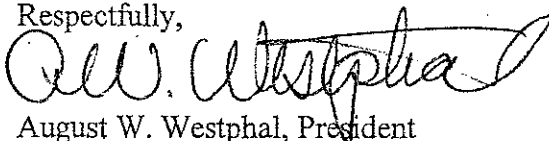
Mr. Tibor Solymosi, Esquire  
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9. Norfolk Southern Railroad was negligent in failing to properly train their employees to watch and direct children away from tracks and have in place and/or initiate accepted methods and procedures to reduce or eliminate accidents which would or should have been known to occur.
10. Norfolk Southern Railroad was negligent in failing to provide a minimum amount of training for Crossing Watchmen in place to guard children in their passing over the tracks in three locations on West 19<sup>th</sup> Street.
11. Norfolk Southern was negligent in the training and application of the Operating Rules of their employees in the instant train operation.
12. Norfolk Southern was negligent in that it is clear following my review and research of the Operating Rules as above outlined, Norfolk Southern Railroad through its employees exhibited a complete disregard for a risk which was clearly known to them.
13. In my opinion the annual cost of \$3,500.00 to install and maintain rumble strips along the area of West 19<sup>th</sup> Street where the accident occurred would have been a small and reasonable expense compared to the risk presented by Norfolk Southern Railroad to children in the area.
14. It is my further opinion that the conduct of Norfolk Southern Railroad through its employees Engineer Timothy J. Price and Conductor Robert B. Glenn above referenced directly and proximately contributed to the serious injury to Robin Nixon on April 27, 1997 on the West 19<sup>th</sup> Street track at Erie, Pennsylvania.

My opinions are to a reasonable degree of railroad certainty

I reserve the right to amend this report if and when additional information and/or material facts are furnished the undersigned.

Respectfully,



August W. Westphal, President  
T. O. P. of Ohio, Inc.

cc: file

# Transit Operations & Personnel Guidance of Ohio, Inc.

P.O. Box 39146  
North Ridgeville, Ohio 44039  
(440) 327-7125 • FAX (440) 327-0362  
e-mail: whiteywestphal1@aol.com

A. W. WESTPHAL  
President

February 16, 2007

Mr. Tibor Solymosi, Esquire  
**SEGAL & SOLYMOSI**  
Attorneys at Law  
818 State Street  
Erie, PA 16501

**Re: Robin Nixon vs. Norfolk Southern**

Dear Mr. Solymosi:

This amendment is concerned with my report this date in the above captioned matter. You will recall I had reserved the right to amend my report in the event additional information or facts were presented to me.

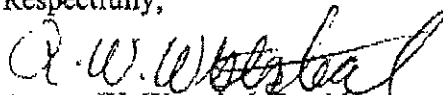
I have now reviewed the Draft Environmental Impact Statement included with F.D. No. 33388 the "Proposed Conrail Acquisition" involving Norfolk Southern and CSX railroads. I would point to the Pedestrian Safety as follows:

The proposed increase in NS trains throughout the residential area of 19<sup>th</sup> Street and the lack of barriers to prevent public access to the tracks would affect pedestrian safety. For example, 76 residences and 30 industrial/commercial businesses between Peach and Raspberry Streets are located adjacent to the 19<sup>th</sup> Street line. In addition, eight area schools are located within 1200 feet of the main line.

This language from the Surface Transportation Board stands out inasmuch as the trackage at West 19<sup>th</sup> Street is directly affected not only in the Merger Proposal but also in the instant accident to Robin Nixon.

Please consider this amendment as a part of my Report dated February 16, 2007

Respectfully,

  
August W. Westphal, President  
T. O. P. of Ohio, Inc.

cc: file



*Westphal*  
*EX. 7*

Member: National Association of Railroad Safety Consultants and Investigators

**GUARINO  
ENTERPRISES**

10859 Hill Road  
Wattsburg, PA 16442  
(814) 825-3570

February 12, 2007

Tibor R. Solymosi, Esquire  
Segel & Solymosi  
818 State Street  
Erie, Pennsylvania 16501

RE: Nixon v. Norfolk Southern Corp., et al.  
Estimate for Striping/Rumble Strips – West 19<sup>th</sup> Street

Dear Mr. Solymosi:

You have asked me to provide you with an estimate for the costs of installing striping, warning signs and rumble strips on West 19<sup>th</sup> Street in Erie, Pennsylvania. The work would cover approximately 1.2 miles on West 19<sup>th</sup> Street from Peach Street to Raspberry Street. The purpose would be to prevent and/or discourage children from riding along the trains and grabbing onto the train in order to be pulled along the roadway.

I have compiled an estimate for the following work which includes all labor, materials and equipment:

1. Install approximately 2.4 miles of rumble strips approximately 16" to 17" long X 7" wide on 1' centers approximately .5 inches deep, the same type that you would see along shoulders on interstate highways. This would include supplying water to the rumble strip mill machine and sweeping up the milled spoils off the pavement behind the rumble strip machine. The rumble strip would have been placed parallel to the railroad tracks and approximately 72 ½ inches from the center of the track to the center of the rumble strip. Based upon my measurements of a number of rail cars, an average width of rail car is approximately 128 ½ inches. A bicycle is approximately 30 inches in width and assuming that a child would be reaching out pretty much straight forward, the center line of the rumble strip should be approximately 72 ½ inches off the center line of the track.

Cost to Install Rumble Strips . . .

\$4,970.00

2. Install a 3 ½ inch wide yellow stripe just outside of the rumble strips, along with signs between the rails indicating DANGER – NO BIKES painted in 24 inch high letters, four signs per city block, with the signs alternating so that they are legible for children traveling in both directions.

Cost to Paint Stripes and Signs . . .

\$2,950.80

- Parking Lot Sweeping
- Pavement Marking
- Pavement Sealcoating
- Snowplowing
- Salting
- Asphalt Patching and Repair

**EXHIBIT**

2

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TOTAL COST FOR RUMBLE STRIPS, STRIPING AND SIGNS \$7,920.80

You have also asked me approximately how long the striping and rumble strips would last and provide an estimate as to how often this work would need to be done. Regarding the striping, I believe that would have to be performed on a yearly basis because of the plowing, salt wear and snow conditions.

Regarding the rumble strips, I know that the City has a constant paving renewal program going on yearly. How often blacktop paving surfaces need to be replaced is dependent on a number of factors such as the thickness of the pavement, the type of soil conditions under the pavement, drainage and traffic volume and the type of vehicles that travel on the roadway. Based upon my many years of experience in maintaining blacktop surfaces, I would estimate that the pavement on a City street could be expected to last approximately eight to ten years. I have examined the surface along West 19<sup>th</sup> Street and found it to be in excellent condition at the present time. Paved streets in the Erie area last conservatively eight to ten (8-10) years on average. Mayers Brothers Construction paved West 19<sup>th</sup> Street in 2002 after the tracks were removed. There is ample drainage and good crown to the road and good drainage and fall to the spills. The photographs you provided to me of West 19<sup>th</sup> Street when the tracks were still in place show that there was a good crown in the roadway providing good drainage away from the tracks. Based on these factors, I believe that on 19<sup>th</sup> Street in this area would last at least eight to ten years.

Taking the initial cost of milling and the yearly maintenance cost of striping, my opinion is that the present yearly cost to install the rumble strips and maintaining the striping over a nine year period would be approximately \$3,503.02 per year on average. Regarding what the costs would have been in the seventies, eighties and nineties, it is my opinion that the costs would have been less than current costs and consistent with cost of living at that time.

My opinion is based on my background, experience and training in the field of asphalt patching, preventive maintenance, repairs and safety/directional striping. It is also based upon my examination of the West 19<sup>th</sup> Street area between Raspberry Street and Peach Street. I have estimated and done this type of work for over 28 years and have based these prices upon what I charge, and what is normally charged for this type of work.


I have never authored or prepared any publications or articles within the preceding ten years nor have I ever testified as an expert at trial or by deposition within the preceding four years. You and I have agreed to an

hourly compensation for my services in this matter at the rate of \$25.00 per hour for preparation of this estimate and report. At this point in time, I have spent seven hours in order to prepare this report. I have attached to this report a drawing indicating what the rumble strips, striping and signage would look like as completed, and a copy of my estimate.

I hereby certify that the estimate and this report are in my opinion the fair market value for the work as stated.

With respect to my qualifications, please find attached hereto a Resume indicating my background, training and qualifications.

Sincerely,

  
James A. Guarino



## **RESUME**

### **Education**

Technical Memorial High School – graduate 1967  
Gannon College – 1 year (1976-1977)

### **Specialized Training**

28 years experience – asphalt repair, milling, sealcoating,  
striping and power sweeping

### **Employment**

General Electric welder – 15 years (1971-1986)  
Guarino Enterprises – 28 years (1979 to present)

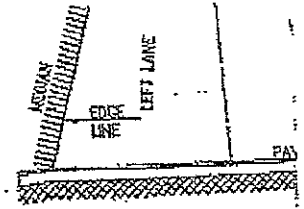
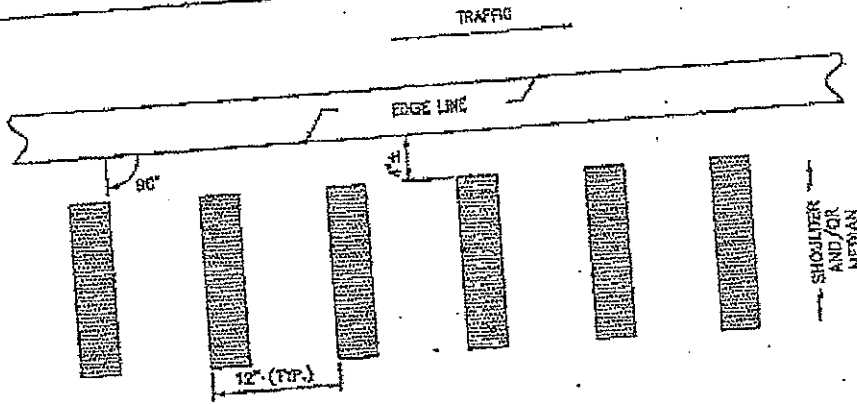
### **Seminars**

Numerous seminars through Sealmaster (asphalt sealing,  
striping, crack filling and repair)

### **Guarino Enterprises**

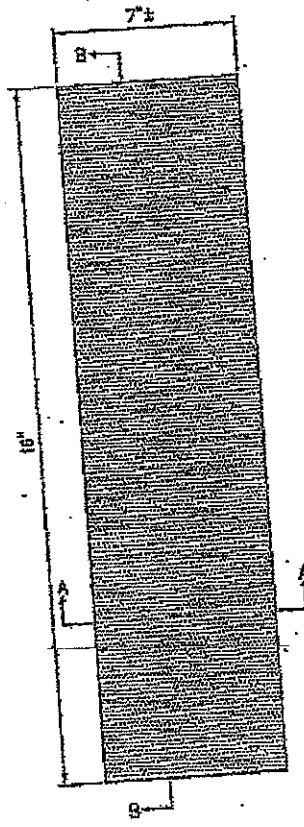
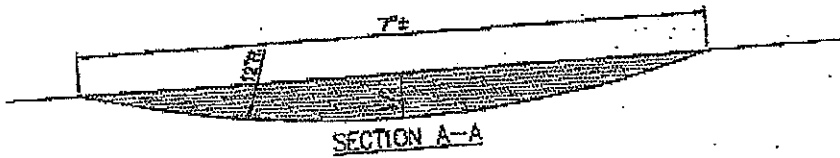
James A. Guarino  
10859 Hill Road  
Wattsburg, PA 16442  
Phone (814) 825-3570  
Fax (814) 825-9934

# RUMBLE STRIP DIAGRAM



SONIC NAP

## LOCATION DETAIL OF SONIC NAP ALERT PATTERN SEE NOTE 4



PLAN



SECTION B-B

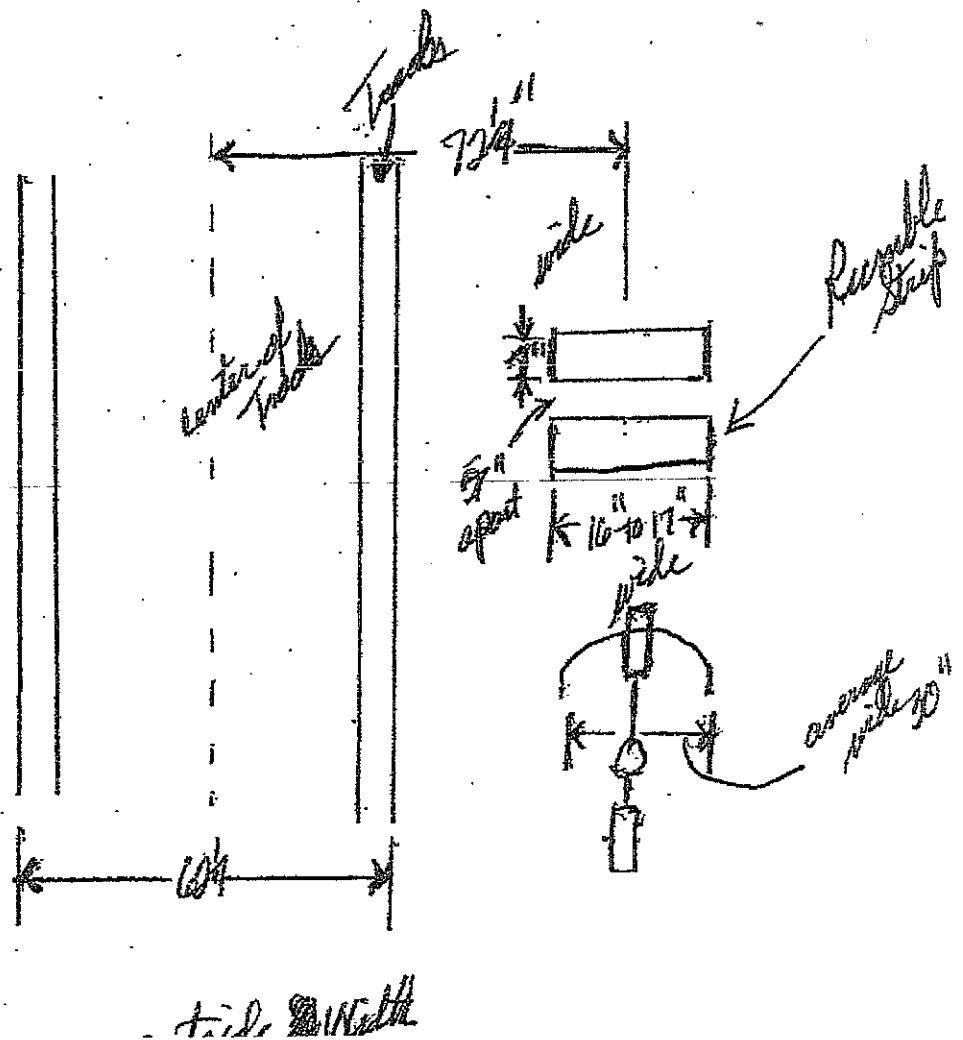
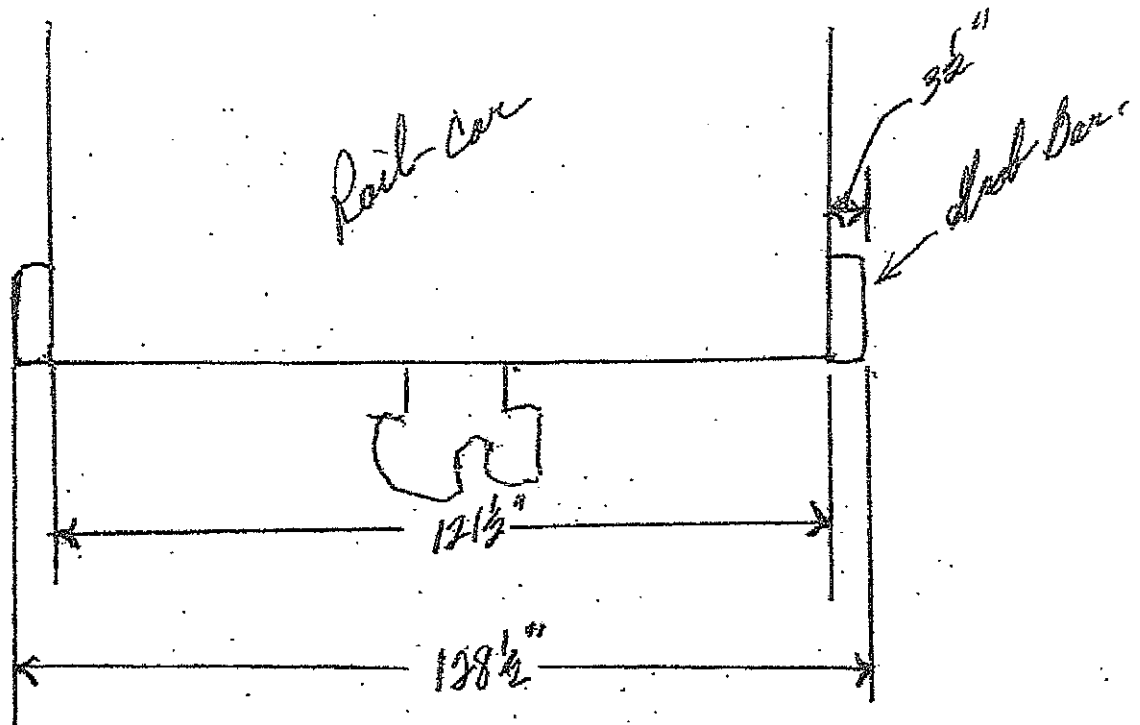
## DETAILS OF SONIC NAP ALERT PATTERN

### LEGEND

(SRPM) SNOWPLOW

SNAP (SONIC NAP)





**ESTIMATE FOR STRIPING AND  
RUMBLE STRIPS FOR WEST 19<sup>TH</sup> STREET**

**MILLING AND CLEANUP:**

Milling 2.4 miles of milled rumble strips:	\$3,600.00
Water truck on site:	\$ 550.00
Two Tri-axle trucks - 2 hours	\$ 260.00
One Athey broom sweeper – 3 hours (cleanup & hauling)	\$ 260.00
Traffic Control- 4 flagmen to direct traffic-3 hours to end of job	<u>\$ 300.00</u>
<b>TOTAL (LABOR, EQUIPMENT AND HAULING)</b>	<b>\$4,970.00</b>

**STRIPING:**

Layout line at 3 ½" wide in solid line on both outer sides of Rumble strip. Sherwin Williams Highway Traffic yellow Paint (12,672 linear feet x .15 cents /foot)	\$1,900.80
Layout DANGER NO BIKES-24" letters between tracks at 4 per block spacing	
42 Stencils in Traffic Yellow paint	<u>\$1,050.00</u>
<b>TOTAL STRIPING</b>	<b>\$2,950.80</b>
 <b>TOTAL COST</b>	 <b>\$7,920.80</b>

**AVERAGE COST OVER NINE YEARS**

Year One – Milling and Striping	\$ 7,920.80
Years Two through Nine – Striping Only	
Eight Times \$2,950.80	<u>\$23,606.40</u>
<b>TOTAL COST</b>	<b>\$31,527.20</b>
 <b>Divided by Nine years Equals a per year average of:</b>	 <b>\$ 3,503.02</b>



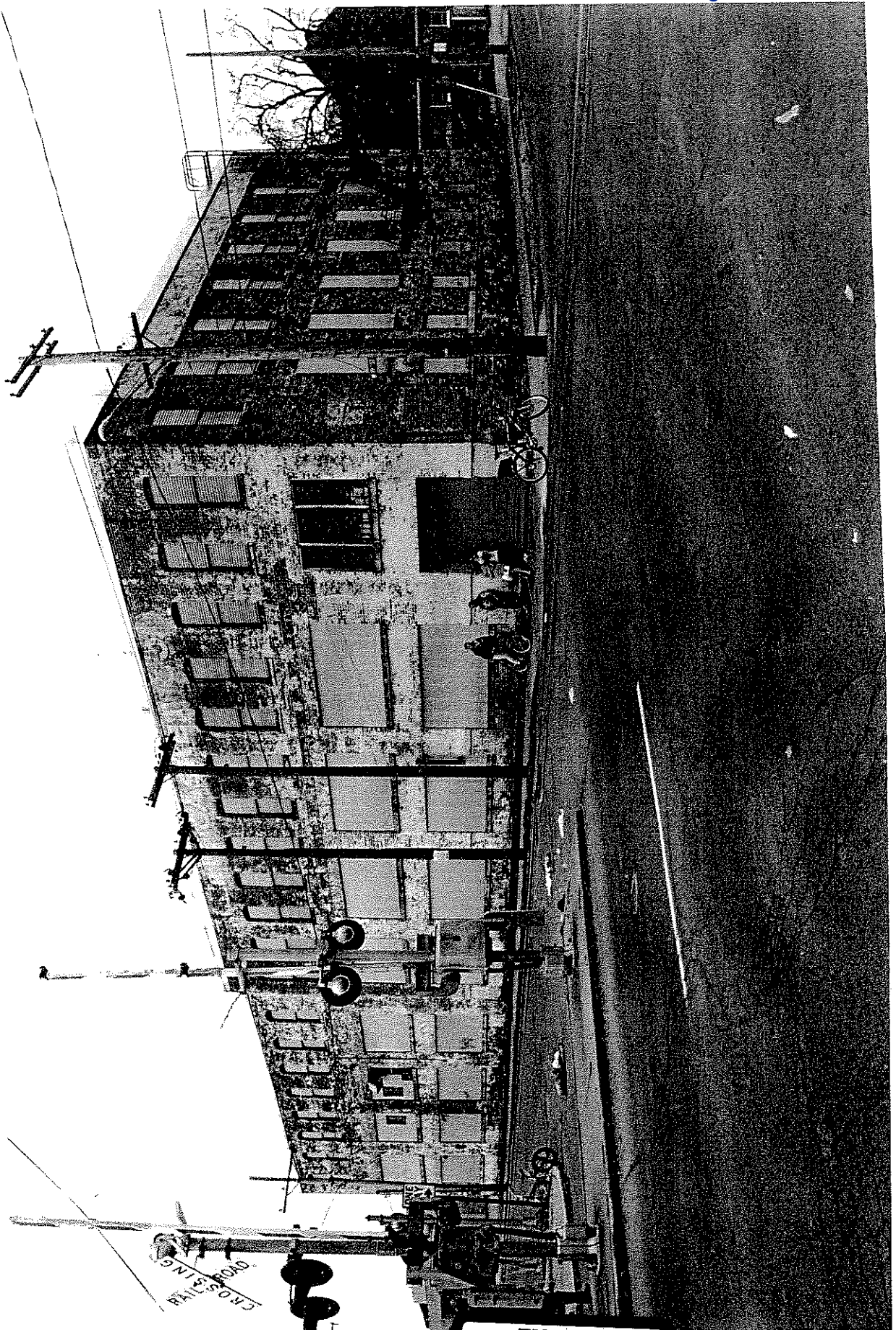
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EXHIBIT

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EXHIBIT

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